Date: July 14, 1997

Case No.: 95-INA-549

In the Matter of:

SHIRLEY SCHINE,
Employer

On Behalf Of:

DOROTA MATEL,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 8, 1994, Shirley Schine ("Employer") filed an application for labor certification to enable Dorota Matel ("Alien") to fill the position of Cook, Kosher (AF 3-4). The job duties for the position are:

> Prepare, season, and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered.

The CO issued a Notice of Findings on April 20, 1995 (AF 40-44), proposing to deny certification on the grounds that it does not appear feasible that the job duties constitute full-time employment as defined by the regulations at 20 C.F.R. § 656.50 (recodified as § 656.3). The CO advised the Employer to establish that the job offer meets the definition of "employment" by providing evidence which clearly establishes that the position, as performed in her household, constitutes full-time employment. Additionally, the CO proposed denial of labor certification as it does not appear that the Employer conducted a good-faith recruitment effort of U.S. workers, in that two applicants, Morton Schmerken and Donna J. Newkirk, responded to a post-recruitment follow-up letter that they were not contacted by the Employer, in direct contrast to the Employer's statement that she did contact both applicants and stated that Mr. Schmerken turned down the job because he did not want to commute and Ms. Newkirk was unqualified. The CO, therefore, found the Employer in violation of the regulations at 20 C.F.R. § 656.21(b)(6) (recodified as § 656.21(b)(5)), and § 656.20(c)(8). Lastly, the CO requested that the Employer clarify the spelling of her last name; *i.e.*, *Shine* or *Schine*.

Accordingly, the Employer was notified that it had until May 25, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 10, 1995, and submitted under cover letter dated May 24, 1995 (AF 45-58), the Employer contended that:

---

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

> Our professional demands and our work load do not allow us to prepare meals or do other cooking related duties ourselves. We need somebody, who will prepare meals for my husband, my elderly mother, and myself. On the days when my daughter and her family / husband and 2 children / visit with us, the cook will prepare dinner for them as well. In addition we need a cook who will prepare and serve refreshments to our students as well.

The Employer further contended that the cooking duties have been done by restaurants, catering services, her mother, and recently her niece, but that her mother is no longer able to do this due to her age and her niece intends to pursue her own professional career. The Employer included with her rebuttal a letter signed by Elizabeth (Illegible), stating that she has been cooking for her aunt for the last couple of years and she intends to start her professional career and will not be able to continue cooking for her, but she is willing to help with cleaning duties on the weekends.

The Employer then stated that the cook will not be required to perform any duties other than cooking and cooking-related duties. The household chores are performed by the Employer and her niece on the weekends. The Employer also included with her rebuttal a daily schedule for the cook to follow, and anticipated that the weekly number of meals prepared will be 105 snacks, 15 lunches, and 15 dinners. She also stated that the cook will bake bread and pastries and do shopping. The Employer stated that this will "fully comprise full-time employment of a cook in our household."

With regard to the U.S. applicants, the Employer stated that they were interviewed by telephone but there are no records available to document such contacts. The Employer included with her rebuttal a Summary of Account from Nynex and AT&T regarding her telephone calls. Lastly, the Employer advised that the spelling of her last name is "Schine."

The CO issued the Final Determination on May 30, 1995 (AF 59-61), denying certification because it does not appear that the job duties constitute full-time, eight hours per day, 40 hours per week employment. The CO further stated that, "... it appears that the position of 'Cook' was created solely for the purpose of qualifying the Alien for a visa as a skilled worker, the only household occupation which falls into the skilled worker category." Additionally, the CO determined that the Employer has failed to establish good-faith recruitment efforts of two U.S. applicants.

On June 7, 1995, the Employer requested review of the Denial of Labor Certification, submitted under cover letter dated June 26, 1995 (AF 62-75). On August 9, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). Counsel for the Employer submitted a Brief on August 29, 1995.

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) provides that an employer must show that U.S. applicants were

rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of a good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

In this case, the CO questioned the Employer's recruitment efforts with regard to two applicants, Mr. Schmerken and Ms. Newkirk (AF 41). In her recruitment report, the Employer stated that she contacted Mr. Schmerken by phone on August 8, 1994 (AF 35). The Employer further stated that, during the interview, the applicant indicated that he did not want to commute to New York City and, therefore, was not interested in the job opportunity. Similarly, the Employer stated that she called Ms. Newkirk on September 23, 1994, and was informed by the applicant that she had no experience as a Kosher Cook (AF 35). However, in response to a questionnaire sent by the New York State Department of Labor, both Mr. Schmerken and Ms. Newkirk stated that they were not contacted by the Employer (AF 25, 33). In fact, Mr. Schmerken made the following statement:

> I am very familiar with Kosher Quisine, [sic] being Jewish myself. The variety of dishes that I could prepare is endless. In addition to being an excellent chef-cook, I am an experienced baker. I seriously doubt that a more qualified person would be available for this job.

(AF 33). In light of these inconsistencies, the CO, in the NOF, requested that the Employer document her contact with these applicants by way of telephone bills, certified mail, etc. (AF 41).

In rebuttal, the Employer stated that a certified mail receipt is not available as the applicants were interviewed on the telephone (AF 54). The Employer further explained that Nynex Telephone Company does not itemize the calls made from New York to "516" or "718" calling areas and, therefore, the telephone calls to the applicants do not appear on her telephone bill. The Employer submitted a telephone bill in support of this contention (AF 45-50). Finally, the Employer made the following statement, "I sincerely believe, that the statement of October 19, 1994 signed by me clearly evidences the contact with the applicants, as it occurred." (AF 54).

We find that the Employer has not produced sufficient evidence to substantiate her claim that she contacted the applicants by telephone. We acknowledge that the Employer's assertion that she made the calls is entitled to some evidentiary weight. See *Gencorp,* 87-INA-659 (Jan. 13, 1988) *(en banc)*. In fact, an uncontradicted assertion that the Employer made the telephone calls to the applicants might have been sufficient to document the contact. However, the Employer in this case faces independent assertions by two applicants that they were not contacted. While an applicant's statement that he was not contacted is not determinative, it is entitled to weight. *Dove Homes, Inc.*, 87-INA-680 (May 25, 1988) (*en banc*). Moreover, independent assertions by two applicants are entitled to more weight. See *Robert B. Fry, Jr.*, 89-INA-6 (Dec. 28, 1989); *Jersey Welding & Fence Co.,* 93-INA-43 (Oct. 13, 1993). As noted above, two U.S. workers in this case independently contradicted the Employer regarding his recruitment efforts. Therefore, we give greater weight to the applicants' statements. We also

note that an employer who contacts applicants through unverifiable means runs the risk of lacking evidence to a challenge to its contact. As such, we find that the Employer has not met her burden of establishing that she engaged in a good-faith recruitment effort. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.[2]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, concurring:

I concur with the conclusion reached by the majority. However, particularly since the fact pattern here is similar to that of numerous other cases, I think it important to note that the requirement of two years experience in kosher cooking is unduly restrictive as should have been found by the CO. (See, *Teresita Tecson*, 94-INA-014 (May 30, 1995).)

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

[2] Because we have affirmed the CO's denial on this ground, we find it unnecessary to discuss whether the Employer established that the job opportunity constitutes full-time employment.